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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FELTON A. SPEARS, JR. and SIDNEY SCHOLL, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

WASHINGTON MUTUAL BANK, FA (aka WASHINGTON MUTUAL BANK); FIRST AMERICAN EAPPRAISEIT, a Delaware corporation; and LENDER'S SERVICE, INC.,

Defendants.

Case No.: 5:08-cv-00868 (RMW)

CLASS ACTION

DEFENDANT LSI APPRAISAL, LLC'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

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Defendant LSI respectfully submits this reply memorandum in further support of its motion to dismiss Plaintiffs' Amended Complaint.[1]

PRELIMINARY STATEMENT

Plaintiffs now concede that LSI did not provide or prepare the appraisal reports on the properties at issue in this action. Indeed, another WaMu vendor, eAppraiseIT, prepared the appraisal reports for Scholl and Spears. Plaintiffs also recognize that the appraisal fees they claim were improperly paid went to eAppraiseIT, not LSI. Recognizing that these facts would preclude a cause of action against LSI, Plaintiffs now seek to shift to two alternative theories of liability.

First, Plaintiffs claim that while LSI may not have "prepared" or "provided" the appraisals, the Company is otherwise directly liable to Plaintiffs because it **may have** "received, reviewed, or altered" one of the appraisal reports. As a preliminary matter, the Amended Complaint does not allege when or whether LSI might have "received, reviewed, or altered" the appraisals. Instead, Plaintiffs cling to the fact that an LSI affiliated email address appears on one of the reports. That stray email address is not evidence of involvement in the appraisal. Moreover, even assuming solely for purposes of argument that the email address indicated that LSI received the appraisal report or was otherwise "involved" in the report, Plaintiffs have not alleged how that activity harmed Ms. Scholl or violated any duty to her. Plaintiffs' theory of liability is clear: they allege that they paid WaMu, and by extension its vendor, for a USPAP complaint appraisal. Plaintiffs claim that they did not receive a USPAP compliant appraisal because the individual appraisers were not independent. LSI was not the vendor responsible for assigning an appraiser for the report on either Plaintiff's property and had no responsibility for the actions that allegedly give rise to liability. LSI received no fee for the appraisals at issue – the entire basis for the damages alleged in the Amended Complaint. Pointing to an email address on one of the appraisal reports does not alter the facts. LSI is not liable to Plaintiffs.

Plaintiffs also contend that they have an "indirect" cause of action even if LSI did not prepare or provide their appraisals, because LSI allegedly conspired with WaMu and eAppraiseIT. As a result of that conspiracy, Plaintiffs claim that LSI is liable to them for the acts of those parties. Plaintiffs'

[1] Unless defined herein, capitalized terms have the same meaning as LSI's opening brief. [Docket Entry ("DE") 48]

conspiracy theory fails for a host of reasons. First, the Amended Complaint fails to adequately allege a conspiracy between LSI and the other defendants. Second, Plaintiffs fail to adequately allege that they were harmed, or even directly impacted by, the alleged conspiracy. Indeed, the bulk of the alleged conspiratorial acts occurred well after the only plaintiff who claims any connection to LSI, Ms. Scholl, had her property appraised and closed her loan. Finally, even if Plaintiffs could plead a conspiracy among the defendants, they cannot use a theory of conspiracy to hold LSI liable for the particular statutory and contractual claims alleged in the Amended Complaint. In sum, Plaintiffs' conspiracy claims are insufficient as a matter of pleading and as a matter of law.

Plaintiffs' efforts to sustain their underlying substantive claims also fail. As a preliminary matter, Plaintiffs do not dispute LSI's showing that the Amended Complaint fails to state a viable claim for the three causes of action plead under the UCL. Likewise, Plaintiffs offer no meaningful rebuttal on their contract claims or their claims under RESPA and CLRA. LSI respectfully asks this Court to dismiss Plaintiffs' claims against LSI with prejudice.

FACTUAL BACKGROUND

A. LSI's Alleged Relationship to the Plaintiffs' Appraisals

1. The Scholl Appraisal

In their opposition to LSI's motion to dismiss, Plaintiffs assert that they have standing to proceed based on an appraisal of Plaintiff Sidney Scholl's property in Edmond, Oklahoma. The appraisal was prepared by an Oklahoma appraiser, Elizabeth Angelo ("Angelo"), who was employed by Angelo Appraisal Services, 1217 Salem Avenue, Edmond, OK 73003. [Docket Entry ("DE") 100, Ex. 2.]

Ms. Scholl's appraisal report (the "Scholl Report," DE 100, Ex. 2) consistently identifies eAppraiseIT and Washington Mutual Bank ("WaMu") as the client for whom the report is being completed. First, the cover page of the Scholl Report reads:

FOR:
Washington Mutual/eAppraiseIt
75 N Fairway Dr
Vernon Hills, Il 60061

The bottom right hand corner of each of the 12 pages of the Scholl Report is also repeatedly stamped:

Completed on behalf of eAppraiseIT.

On Line 9 of the first page of the "Summary Appraisal Report" form in the Scholl Report, the "Lender/Client" is identified as "Washington Mutual/eAppraiseIT."

Summary Appraisal Report

Exterior-Only Inspection Residential Appraisal Report 03-2783-004746897-0 File # 2968756

The purpose of this summary appraisal report is to provide the lender/client with an accurate, and adequately supported, opinion of the market value of the subject property.

Property Address 817 NW 194th Ter — City Edmond — State OK — Zip Code 73003

Borrower Sidney Scholl — Owner of Public Record OKGeoBuilders LLC — County Oklahoma

Legal Description Lot 2 Block 3 Stonebriar Sec 1

Assessor's Parcel # 20-637-1460 — Tax Year 2006 — R.E. Taxes $ 0

Neighborhood Name Stonebriar — Map Reference 36420 — Census Tract 40109-1082.12

Occupant ☐ Owner ☐ Tenant ☒ Vacant — Special Assessments $ None — ☐ PUD — HOA $ N/A — ☐ per year ☐ per month

Property Rights Appraised ☒ Fee Simple ☐ Leasehold ☐ Other (describe)

Lender/Client Washington Mutual/eAppraiseIt — Address 75 N Fairway Dr, Vernon Hills, Il 60061

Is the subject property currently offered for sale or has it been offered for sale in the twelve months prior to the effective date of this appraisal?

Report data source(s) used, offering price(s), and date(s). Oklahoma City MLS Listing Service

The last page of the form again calls for "Lender/Client" and "Company Name." In response, Angelo entered: "Washington Mutual/eAppraiseIT" at the address of "75 N. Fairway Drive, Vernon Hills, IL 60061." Below the Lender/Client's name and address, reads an email address of "lsistatus@lendersservice.com," the sole reference to LSI in the 12 page Scholl Report. This information is depicted on page 6 of the form:

LENDER/CLIENT

Name

Company Name Washington Mutual/eAppraiseIt

Company Address 75 N Fairway Dr, Vernon Hills, Il 60061

Email Address lsistatus@lendersservice.com

Finally, at the top of the two pages of photos following that form, the "Lender" line reads: "Washington Mutual/eAppraiseIT:"

Subject Photos

Borrower/Client Sidney Scholl

Property Address 817 NW 194th Ter

Lender Washington Mutual/eAppraiseIt

LSI is not identified as the client anywhere in the twelve page Scholl Report, which is not surprising given that "Washington Mutual/eAppraiseIT" was the client.

2. The Spears Appraisal

Plaintiffs do not allege that LSI provided appraisal services to Plaintiff Felton Spears.

B. The Alleged Conspiracy

The Scholl Report is dated September 17, 2006. Plaintiffs allege that "in or about June 2006," WaMu retained LSI and eAppraiseIT to handle "all of WaMu's home loan appraisals." Am. Cplt., ¶¶ 6, 33, 35. Plaintiffs allege that as part of this business venture, LSI and eAppraiseIT "took on new employees who formerly worked for WaMu," and they gave WaMu the right to review an appraiser's work product and "challenge an appraiser's conclusions." *Id*. at ¶¶ 37, 38.

Plaintiffs then claim that "as early as August 9, 2006, WaMu's internal staff admonished [**eAppraiseIT**] for not providing appraisals at the values they wanted." Am. Cplt. ¶ 41 (emphasis added). This allegation not only does not implicate LSI, but is based on the New York Attorney General's complaint against First American Corporation and eAppraiseIT (the "NYAG Complaint," attached hereto at Exhibit A). The NYAG Complaint does not name LSI as a party and neither makes allegations against LSI nor makes allegations that LSI, eAppraiseIT, and WaMu participated in a conspiracy.

The first mention of alleged wrongdoing on LSI's part involves conduct that took place in 2007, more than one year after the Scholl Report was completed. In the Amended Complaint, Plaintiffs claim that "[i]n order to guarantee WaMu would get the high appraisals it wanted, without having to go through the delay of the rebuttal system, by the **winter of 2007**, WaMu insisted that [eAppraiseIT] and LSI use WaMu's 'Preferred Appraisers' for all of WaMu's home loan appraisals." *Id.*, ¶ 42 (emphasis added). Plaintiffs follow up that allegation with further emphasis on conduct that took place in 2007. For example:

> In an email dated **February 22, 2007**, [eAppraiseIT's] President explained to senior executives at [eAppraiseIT's] parent corporation, First American, that…[w]e had a joint call with Wa[M]u and LSI today…. In short, we will now assign all WaMu's work to WaMu's "Proven Appraisers."

Id., ¶ 43 (emphasis added); *see also* ¶ 36 ("[eAppraiseIT] and LSI acquiesced to WaMu's demand to staff appraisals with Preferred Appraisers."); ¶¶ 45, 47, 53, 54 (citing emails to and from eAppraiseIT dated between March 5, 2007 and April 17, 2007).

ARGUMENT

Plaintiffs do not dispute that LSI did not prepare or provide Plaintiffs' appraisals. They make no claim that LSI had any role in providing Plaintiff Spears' appraisal. Instead, Plaintiffs try to evade the fact that they have no relationship with LSI that could give rise to a legal duty, and present a tortured theory of "involvement" based upon an email address.

A. Plaintiffs' Claim That LSI Was Tangentially "Involved" in the Scholl Report Cannot Establish Standing

Instead of conceding that they cannot establish a direct injury traceable to LSI, Plaintiffs argue that LSI was directly involved in the Scholl appraisal. Plaintiffs point out for the first time in their opposition to LSI's motion to dismiss that the email address lsistatus@lendersservice.com appears in the Scholl appraisal, but a reference to an anomalous email address that does not correspond to any of the information around it is not sufficient to allege direct involvement in an appraisal. Moreover, direct involvement, even assuming arguendo that it did occur, does not constitute the directly traceable injury required to establish standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Seeking to create jurisdiction, Plaintiffs argue that the Rice Affidavit does not deny that LSI "received, reviewed, or altered" the Scholl appraisal. [DE 99, pp. 2-5.] LSI, however, did not engage in any of this conduct, and the Amended Complaint does not allege that LSI "received, reviewed, or altered" either Plaintiff Scholl or Spears' appraisals. In fact, WaMu's memorandum in support of its motion to dismiss the Amended Complaint confirms that Plaintiff Scholl's appraisal was not provided by LSI. [DE 47, p. 2 ("[N]either Plaintiff's appraisal appears to have been performed by an appraiser contracted through LSI.").] Rather, WaMu obtained Scholl's appraisal through eAppraiseIT. [*Id.*] "As eAppraiseIT is a separate company with no corporate relationship to LSI or its parent company, Fidelity National Information Services, this indicates that the appraisal was not prepared by LSI." [DE 48, Rice Affidavit, ¶ 8.]

Moreover, in both the Amended Complaint and in their briefs, especially Plaintiffs' combined opposition to WaMu and eAppraiseIT's motions to dismiss, Plaintiffs make clear that their claims against LSI and eAppraiseIT are based on the vendor having "provided," and not just " received, reviewed, or altered," their appraisals:

- Defendant Washington Mutual Bank, FA ("WMB")… conspired with two Appraisal Management Companies ("AMCs"), i.e., Defendants First American eAppraiseIT ("EA") and Lender's Service, Inc. ("LSI"), ***to provide*** Plaintiffs with appraisal reports on WMB loans… [DE 101, p. 1 (emphasis added).]
- EA and LSI ***provided*** WMB with counterfeit, sham appraisals which WaMu delivered to and charged Plaintiffs. [*Id*., pp. 4-5 (emphasis added).]
- EA and LSI have been paid millions of dollars directly from WMB's borrowers ***for providing*** counterfeit, sham appraisals. [*Id*., p. 6 (emphasis added).]
- EA or LSI, in furtherance of their conspiracy with WMB, ***provided*** a counterfeit, sham appraisal that is of no value at all. [*Id*., p. 9 (emphasis added).]

Furthermore, nowhere in the Scholl Report does the appraiser name LSI as the client or an intended user of the appraisal. The fact that eAppraiseIT as the client engaged the appraiser for this assignment is reflected on page one of the report, which states that this appraisal of property located in Edmond, Oklahoma was prepared for "Washington Mutual/eAppraiseIT." The appraiser also states on every page of the report that the appraisal was "[c]ompleted on behalf of eAppraiseIT." [DE 100, Ex. 2.] The Scholl Report lists eAppraiseIT or WaMu as the client more than a dozen times. The fact that LSI's email address appears once on the Scholl report does not convey standing. None of the case law cited by Plaintiffs supports the notion that it does. [DE 99, pp. 2-5.] *See Lujan*, 504 U.S. 555 (injury in fact element of standing cannot be conjectural or hypothetical).

Additionally, under USPAP, the appraiser must identify the client and any other intended users of the appraisal.[2] *See* USPAP 2008-2009, Standards Rules 1-2, 7-2. The appraiser of Ms. Scholl's property did not list LSI as the "client" or an "intended user" of the appraisal. Instead, the Scholl Report identifies the intended users of the Scholl appraisal as "Washington Mutual/eAppraiseIT," the

[2] The "client" is defined by USPAP as "the party or parties who engage an appraiser (by employment or contract) in a specific assignment." USPAP, Statement on Appraisal Standards No. 9. USPAP defines the "intended user" as "the client and any other party as identified, by name or type, as users of the appraisal, appraisal review, or appraisal consulting report by the appraiser on the basis of communication with the client at the time of the assignment." *Id*.

"lender/client." [DE 100, Ex. 2, p. 4.] The Scholl Report designates WaMu three lines above LSI's email address as the "lender" [*Id*., p. 6.], and it names "Washington Mutual/eAppraiseIT" three lines above the LSI email address as the "client." [*Id*.]

B. Plaintiffs Do Not Show That LSI Was Involved in a Conspiracy

As an alternative to their theory of "direct" liability based on an email address, Plaintiffs argue that they can establish standing against LSI based on the conspiracy allegations in the Amended Complaint. [DE 99, pp. 5-10.] But none of the cases cited by Plaintiffs support the conclusion that the conspiracy allegations in the Amended Complaint could be used to establish Article III standing. [DE 99, pp. 5-10.] "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994). When conspiracy is properly alleged, "a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy." *Id*. at 511. However, for conspiracy liability to arise, a coconspirator must owe a duty to plaintiff recognized by law and be potentially subject to liability for breach of that duty. *Id*.

1. Plaintiffs Fail to Adequately Allege a Conspiracy

To establish liability for conspiracy, "a plaintiff must plead both an agreement to participate in an unlawful act, and an injury caused by an unlawful overt act performed in furtherance of the agreement." *Alfus v. Pyramid Technology Corp.*, 745 F. Supp. 1511, 1520 (N.D. Cal. 1990). "A bare agreement among two or more persons to harm a third person cannot injure the latter unless and until acts are actually performed pursuant to the agreement." *Applied Equipment Corp*, 7 Cal. 4th at 511. Thus, the essence of a conspiracy action "is the acts done." *Id*.

"[B]are legal conclusions, inferences, generalities, presumptions, and conclusions are insufficient" to allege conspiracy. *State ex rel. Metz v. CCC Information Services, Inc.*, 149 Cal. App. 4th 402, 419 (Cal. Ct. App. 2007); *see also Alfus*, 745 F. Supp. at 1521 (in civil conspiracy actions alleging fraud, "courts insist upon a higher level of specificity than is usually demanded of other pleadings"). "[T]he complaint must allege facts such as a 'specific time, place, or person involved in the

alleged conspiracies' to give a defendant seeking to respond to allegations of conspiracy an idea where to begin." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. Cal. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1970 n.10 (2007)).

Moreover, following the Supreme Court's recent decision in *Twombly*, the requirements for pleading conspiracy must consist of more than formulaic recitations of the legal elements, loosely tied to the facts. *Twombly*, 127 S. Ct. at 1965. *Twombly* addresses the general pleading standard under Rule 12(b)(6) within the context of an antitrust conspiracy. This standard has since been applied by the Ninth Circuit in antitrust cases, as well as District Courts within the Ninth Circuit to non-antitrust matters. *See, e.g., Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC*, __ F.3d __, 2008 WL 2697793 (9th Cir. 2008); *Grosz v. Lassen Community College Dist.*, __ F. Supp. 2d __, 2008 WL 2119923 (E.D. Cal. 2008).

Here, Plaintiffs' allegations of conspiracy fail even under a pre-*Twombly* pleading standard. Significantly, the crux of Plaintiffs' conspiracy theory is that Defendants used the Proven Appraiser List to manipulate the values contained in their appraisals. [DE 14, ¶¶ 42-56.] Yet Plaintiffs fail to make any connection between their appraisals and the Proven Appraiser List. Paragraph 42 of the complaint refers to WaMu insisting on use of the Proven Appraiser List by **winter 2007**. Meanwhile, the Scholl appraisal was completed in September 2006, one year **before** the alleged conspiracy. eAppraiseIT's decision to assign all WaMu work to "Proven Appraisers" also took place in February 2007, **after** the Scholl appraisal was completed. *See supra*, p. 4. Thus, there is an insufficient nexus between the Scholl appraisal and the so-called conspiracy.

At a more basic level, the Amended Complaint does not allege that LSI ever entered into any agreement with eAppraiseIT. Rather, the Amended Complaint pleads that WaMu retained both LSI and eAppraiseIT to provide independent appraisals, and then alleges that this retention agreement somehow constituted a conspiratorial meeting of the minds:

- In or about June 2006, WaMu entered an agreement, conspiracy or scheme with EA and LSI … to handle all of WaMu's home loan appraisals. Am. Cplt., ¶ 6.
- In 2006 … WaMu attempted to insulate itself from criticism and federal oversight by entering into an agreement with two purportedly independent Appraisal Management

> Companies ("AMCs"), First American eAppraiseIT and Lender's Services, Inc., whereby WaMu would procure appraisals from these two AMCs on behalf of borrowers for all or nearly all WaMu residential loans nationwide…. *Id.*, ¶ 33.

- In or about June 2006, WaMu retained EA and LSI to administer WaMu's appraisal program. *Id.*, ¶ 35.

There is no allegation that WaMu assigned the same appraisals to both companies or that LSI and eAppraiseIT worked together on the same appraisals. In fact, the Amended Complaint alleges the opposite – it states that appraisals "were obtained through either EA or LSI." [DE 14, ¶ 1.] The Amended Complaint fails to allege an agreement or conspiracy between LSI and eAppraiseIT. *See Wasco Products, Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) (without allegations that the parties ever formed an agreement to commit wrongful acts, plaintiff "failed under federal law to allege the most basic and fundamental element of a civil conspiracy"); *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127 (N.D. Cal. 2005) (complaint dismissed where scope of the conspiracy was ambiguous); *Kendall*, 518 F.3d at 1048 (following *Twombly* to dismiss complaint where plaintiffs "failed to plead any evidentiary facts beyond parallel conduct to prove their allegation of a conspiracy").

Plaintiffs further hedge their bets by referring to LSI and eAppraiseIT collectively – without any basis for doing so – in the context of discussing their own specific appraisals:

- In connection with this appraisal, WaMu procured for itself and Ms. Scholl an appraisal on the subject property from EA *and/or* LSI. Am. Cplt., ¶ 59 (emphasis added).
- In connection with this appraisal, WaMu procured for itself and Mr. Spears an appraisal on the subject property from EA *and/or* LSI. *Id.*, ¶ 64 (emphasis added).

To the extent that these allegations "are ascribed to defendants collectively rather than to individual defendants," they are insufficient. *Arikat v. JP Morgan Chase & Co.*, 430 F. Supp. 2d 1013, 1020 (N.D. Cal. 2006).

Finally, Plaintiffs' allegations regarding the NYAG Complaint are not "evidence" of a conspiracy between Defendants. Tellingly, LSI is not named as a defendant in the NYAG Complaint. The allegations contained therein pertain to eAppraiseIT and its relationship with WaMu. The NYAG Complaint does not allege that a conspiracy existed between those two entities or in any way suggest

that there was any meeting of the minds between WaMu and eAppraiseIT to provide "unlawful and incredible" appraisals.

2. Plaintiffs Fail to Adequately Allege Any Harm From A Conspiracy

Even reading the Amended Complaint in the light most favorable to Plaintiffs, none of the alleged conspiratorial acts affected their appraisals or otherwise caused them harm. *See Alfus*, 745 F. Supp. at 1520 (holding that conspiracy requires "an injury caused by an unlawful overt act performed in furtherance of the agreement").

The Amended Complaint alleges the following conspiratorial acts:

- EA and LSI acquiesced to WaMu's demand to staff appraisals with Preferred Appraisers. Am. Cplt., ¶ 36.
- Both LSI and EA agreed to WaMu's request and took on new employees who formerly worked for WaMu as its appraisers and regional managers. *Id*., ¶ 37.
- WaMu frequently used this 'reconsideration of value' technique to get EA and LSI to provide higher appraisal values on homes to enable its origination staff to close the loans. *Id*., ¶ 38.

The Proven Appraiser List is central to Plaintiffs' conspiracy theory. [DE 14, ¶¶ 42-56.] Despite their general allegations of conspiracy, there is no connection between the Proven Appraiser List and Plaintiffs' appraisals. Indeed, the Amended Complaint is notable for what it does not allege:

- Plaintiffs do not allege that either appraisal was completed by a Preferred Appraiser or that the Preferred Appraiser list existed at the time of their appraisals.
- Nor do they allege involvement of an employee who formerly worked for WaMu.
- There is no allegation as to how and when the relevant appraisers were hired into LSI or eAppraiseIT's network of appraisers or the circumstances surrounding her becoming an appraiser for LSI or eAppraiseIT.
- Nor is there any allegation that either of the subject appraisals were subject to requests for "reconsideration of value" for a higher appraisal value.
- There is no allegation that the appraisals violated USPAP or were subject to inappropriate contact or improper pressure by Defendants.
- There is no allegation that the values contained in the appraisal reports were inflated.

The Amended Complaint simply concludes that Plaintiffs' appraisals were "created pursuant to the scheme described in this Complaint." [*Id*. ¶¶ 61, 66.] Plaintiffs elsewhere argue that they bought "unlawful and incredible" appraisals because there was a conspiracy to sell "unlawful and incredible" appraisals. [DE 99, p. 5.] But "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." *Twombly*, 127 S. Ct. 1964-65.

In the absence of any specific allegations connecting the injury alleged by the Plaintiffs to the actions of the conspiracy, the Amended Complaint fails to sustain an actionable claim against LSI or any of the other conspirators. *Alfus*, 745 F. Supp. at 1520-21 (granting defendants' motion to dismiss where "Plaintiff has not alleged an injury causing damages or an agreement, and the conclusory statements that she makes are not sufficient to state a claim for conspiracy against the individual defendants."); *see also Roberts v. Heim*, 670 F. Supp. 1466, 1484 (N.D.Cal. 1987) ("To state a claim for conspiracy, plaintiffs must plead an agreement to participate in an unlawful act and an injury caused by an unlawful overt act performed in furtherance of the agreement."), *aff'd in part and rev'd in part on other grounds sub nom., Roberts v. Peat, Marwick, Mitchell & Co*., 857 F.2d 646 (9th Cir. 1988).

3. LSI Had No Legal Duty to Plaintiffs That Could Serve as the Basis for a Conspiracy Claim

Even if the Amended Complaint adequately alleged a conspiracy that was the proximate cause of damage to the named defendants, those allegations would be insufficient to state a cause of action against LSI. The cases cited by the Plaintiffs stand for the unremarkable proposition that conspiracy may extend tort liability for an underlying wrong. California law makes it clear, however, that that liability does not extend indefinitely. "By its nature, tort liability arising from conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." *Applied*, 7 Cal. 4th at 511. In *Applied*, the California Supreme Court recognized that this meant that a plaintiff could not state a cause of action for a conspiracy to breach a contract, that "a party to contract owes no tort duty to refrain from interference with its performance, [therefore,] he or she cannot be bootstrapped into tort liability by the pejorative plea of conspiracy."[3] *Id.* at 514.

The same rule also applies when the duty allegedly breached is statutory. In *The Doctors' Company v. Superior Court*, 49 Cal. 3d 39, 45 (1989), for example, the court found that a plaintiff could

[3] While Plaintiffs do not appear to have alleged a cause of action for conspiracy to breach a contract, any use of conspiracy to establish standing for a contract claim is clearly precluded by *Applied*. 7 Cal. 4th at 511. The *Applied* court did recognize that a party to a contract could bring a suit against a third party for tortious interference with contract, but Plaintiffs have not alleged any such claim against LSI.

not state a claim for conspiracy where the underlying statutory duty did not attach to third parties. *See also id.* at 46 ("The duty invoked here . . . is likewise peculiar to the insured because the duty is created by statute which imposes it only on persons in the insurance business.") Because the defendants in *Doctors' Company* were not subject to the statutory duty, the court concluded that "they cannot be held accountable on a theory of conspiracy." *Id.* at 45 (*quoting Gruenberg v. Aetna Insurance Co.*, 9 Cal. 3d 566, 576 (1973)).

Likewise here, the particular statutory duties invoked by Plaintiffs do not attach to third parties outside the specific commercial and contractual relationships defined by federal and California law. Indeed, Plaintiffs fail to cite a single case where a third party to a commercial relationship was held liable for a conspiracy to violate RESPA, the CLRA or the UCL. In fact, Plaintiffs cite just a single decision entailing any of those statutes, *People v. Bestline Products, Inc.*, 132 Cal. Rptr. 767 (Ct. App. Cal. 1976). *Bestline* was an action brought by the State of California, not a private plaintiff and "said nothing about recovering restitution from a defendant who received nothing." *Madrid v. Perot Sys. Corp.*, 30 Cal. Rptr. 3d 210, 222 (Ct. App. Cal. 2005). In considering the decision in *Bestline*, the *Madrid* court concluded that it did not support permitting a private plaintiff to recover under the UCL from a party that never received funds from the transaction in question. To the contrary the court noted that the plaintiff there failed "to cite any authority that a UCL plaintiff may recover money from a defendant who never received it on a theory that the defendant conspired with or aided someone else who did receive it." *Id.* Here there is no basis to conclude that LSI owed a statutory duty to either Mr. Spears or Ms. Scholl. As result, there is no basis to assert standing based on a theory of conspiracy.

C. Plaintiffs' Claims Fail as a Matter of Law

Plaintiffs contend that, based on an appraisal for an Oklahoma property, prepared by an Oklahoma appraiser, licensed by the State of Oklahoma, for a closing that took place in Oklahoma and funded by a lender in Illinois, they have stated various causes of action under California law.[4] Plaintiffs, however, do not dispute and much less address their UCL claims as they apply to LSI in the Second,

[4] Plaintiffs allege that Ms. Scholl is a California resident who initiated her request for a loan at a WaMu office in Sonoma county, but that is the extent of the connection to California.

Third and Fourth Claims of the Amended Complaint. Thus, those claims should be dismissed. *See In re Calpine Corp. Erisa Litig.*, 2005 U.S. Dist. LEXIS 34452, at *21 (N.D. Cal. Dec. 5, 2005) (finding that plaintiff conceded a point by "by utterly failing to address the [issue] in his opposition briefs" and granting defendants' motions to dismiss plaintiff's amended complaint without leave to amend). Plaintiffs' response was limited to the RESPA, CLRA, breach of contract and quasi-contract claims.

1. RESPA and CLRA Claims

Plaintiffs cannot state a claim under RESPA or the CLRA because these statutes have independent standing requirements. *See, e.g., Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 996 (N.D. Cal. 2007) ("[T]he … CLRA protect[s] only plaintiffs who have suffered harm 'as a result of' defendants' unlawful or unfair practices.") (citing Cal. Civ. Code § 1780 (CLRA)); *Moore v. Radian Group, Inc.*, 233 F. Supp. 2d 819 (E.D. Tex. 2002) (discussing standing under RESPA); *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997) (discussing standing under RESPA).

For the same reasons that Plaintiffs cannot establish Article III standing, they cannot make a sufficient showing of standing under RESPA or the CLRA.[5]

2. Breach of Contract

Plaintiffs contend that the Scholl appraisal gives rise to a reasonable inference that LSI was a contracting party for Plaintiffs' appraisal reports. [DE 99, pp. 22-24.] Plaintiffs' argument is meritless.

"Under California law, the elements required to establish actionable breach of contract are the existence and terms of the contract, plaintiff's performance, defendant's breach, and damages therefrom." *McColm v. Abner*, 2006 WL 3645308, at *11 (N.D. Cal. Dec. 12, 2006) (citing *Amelco Elec. v. City of Thousand Oaks*, 27 Cal. 4th 228, 243 (2002)).

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[5] Even if Plaintiffs had addressed their UCL claims in their response, like RESPA and the CLRA, the UCL also has a statutory standing requirement which Plaintiffs cannot meet. *See, e.g., Peterson v. Cellco Partnership*, 2008 Cal. App. LEXIS 1121, at *11 (Ct. App. Cal. June 26, 2008) (holding that a plaintiff pursuing a private UCL action "must make a twofold showing: he or she must demonstrate injury in fact *and* a loss of money or property caused by unfair competition"); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 947 (S.D. Cal. 2007) ("[U]nder… the UCL…, a plaintiff seeking to represent claims on behalf of others must show "(1) she has suffered actual injury in fact, and (2) such injury occurred as a result of the defendant's alleged unfair competition.").

The Scholl appraisal does not show that Plaintiffs and LSI entered into a contract, how Plaintiffs performed pursuant thereto, how LSI breached that contract, or how Plaintiffs were damaged thereby. The parties to the Scholl appraisal were Ms. Angelo and eAppraiseIT. According to the allegations of the complaint, Plaintiffs are not trying to recover for breach of contract under the theory of a third-party beneficiary.

Furthermore, the report only proves that appraisal services were in fact rendered by Ms. Angelo in connection with Plaintiff Scholl's Oklahoma property. USPAP acknowledges that a client may engage an appraiser by employment or contract. USPAP, Statement on Appraisal Standards No. 9. It does not follow that Plaintiffs and LSI, two unrelated parties, entered into a contract regarding these services simply because the services were performed. Thus, it would be unreasonable to infer the existence of a contractual relationship between Plaintiffs and LSI based on the Scholl appraisal.

3. Unjust Enrichment

Plaintiffs' assertion that LSI received fees from Plaintiffs via WaMu because "it is listed on Ms. Scholl's appraisal report as the appraiser's client" fails to state a cause of action. Moreover, Plaintiffs mischaracterize the allegations of the Amended Complaint by arguing that WaMu paid LSI "increased fees in exchange for its services in assisting the conspiracy to charge WMB borrowers for counterfeit appraisals." [DE 99, pp. 24-25.] The Amended Complaint only alleges that appraisers on the Proven Appraiser List received an additional 20% fee – not LSI. The Amended Complaint does not allege that appraisers on the Proven Appraiser List shared those fees with LSI. Regardless, there is no allegation that Ms. Angelo or the appraiser that prepared Plaintiff Spears' appraisal was a Proven Appraiser.

"The elements of an unjust enrichment claim are the 'receipt of a benefit and [the] unjust retention of the benefit at the expense of another.'" *Peterson*, 2008 Cal. App. LEXIS 1121 at *17. The only damages Plaintiffs claim are the fees paid for their appraisals. [DE 99, pp. 16-18]. The Amended Complaint does not allege that Plaintiffs were charged for their appraisals by LSI or that LSI received any portion of these fees. Without a claim that LSI received a benefit at Plaintiffs' expense, their claim for unjust enrichment fails.

CONCLUSION

For the foregoing reasons, LSI respectfully requests that the Court grant its motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, all claims stated against LSI.

Dated: August 1, 2008

DEWEY & LEBOEUF LLP

By: /s/ *Margaret A. Keane*

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Attorneys for Defendant LSI Appraisal, LLC

CERTIFICATE OF SERVICE

I declare that I am over the age of eighteen (18) years and not a party to this action. My business address is: Dewey & LeBoeuf LLP, One Embarcadero Center, Suite 400, San Francisco, CA 94111.

On August 1, 2008, the foregoing **DEFENDANT LSI APPRAISAL, LLC'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS** was filed with the Clerk of the Court using the Official Court Electronic Case Filing System ("ECF System"). The ECF System is designed to automatically generate an e-mail message, with a link to the filed document(s), to all parties in the case registered for electronic filing, which constitutes service. The ECF system will send notification of such filing to the following:

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A true and correct copy of the foregoing **DEFENDANT LSI APPRAISAL, LLC'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS** was served via United States Mail, postage prepaid, to the following party:

Kerry Ford Cunningham
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New York, NY 10281

DATED: August 1, 2008 at San Francisco, California.

/s/ *Margaret A. Keane*
MARGARET A. KEANE